FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1261

DETROIT TYPOGRAPHICAL UNION NO. 18, INTERNATIONAL TYPOGRAPHICAL UNION, *Petitioner*,

v.

DETROIT NEWSPAPER PUBLISHERS ASSOCIATION, THE DETROIT NEWS, and THE DETROIT FREE PRESS, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S SUPPLEMENTAL MEMORANDUM

GERHARD P. VAN ARKEL
EUGENE GRESSMAN
1828 L Street, N.W.
Washington, D. C. 20036

SHELDON L. KLEINER
2460 First National Building
Detroit, Michigan 48226

Counsel for Petitioner

April 18, 1973

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1261

DETROIT TYPOGRAPHICAL UNION NO. 18, INTERNATIONAL TYPOGRAPHICAL UNION, *Petitioner,*

v.

DETROIT NEWSPAPER PUBLISHERS ASSOCIATION, THE DETROIT NEWS, and THE DETROIT FREE PRESS, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

PETITIONER'S SUPPLEMENTAL MEMORANDUM

Petitioner files this supplemental memorandum to call to this Court's attention a recent, unreported memorandum opinion of the Third Circuit that bears directly on the appropriateness of granting certiorari in this case. That opinion, which is reprinted in the Appendix herein, is entitled *Newspaper, Newsprint, Mag-*

azine, and Film Delivery Drivers, Local Union No. 211, Appellant, v. *Pittsburgh Press Company,* Appellee, No. 72-2141, dated December 26, 1972.[1]

The Third Circuit's memorandum opinion was rendered six days after the Sixth Circuit's opinion in the instant case, which was dated December 20, 1972. But the Third Circuit obviously was not aware of the Sixth Circuit's opinion when it wrote its memorandum opinion. Nonetheless, the Third Circuit did make approving references to the oral opinion of the District Court for the Eastern District of Michigan in the instant proceeding, as reported at 81 LRRM 2797. And the Third Circuit's action in granting enforcement of the status quo clause pending the appeal is tantamount to a conflict with the Sixth Circuit's refusal to enforce a status quo clause.

The *pendente* restraint issued by the Third Circuit in this *Newspaper Delivery Drivers* case is precisely the kind of enforcement of a status quo clause that it had earlier decreed in June of 1972 pending the appeals in *Pittsburgh Newspaper Printing Pressmen's Union No. 9, et al.* v. *Pittsburgh Press Co.* (81 LRRM 2438, 2439), referred to at page 12 of the Petition for Certiorari herein.[2] More importantly, that kind of en-

---

[1] Petitioner's counsel were unaware of this memorandum opinion prior to the filing of the Petition for Certiorari on March 15, 1973.

[2] The appeals in *Printing Pressmen's Union No. 9* were argued orally to the Third Circuit on April 3, 1973, and are under advisement by that court. That court is aware not only of the Sixth Circuit's decision in the instant proceeding but of the pendency before this Court of the Petition for Certiorari herein. Should the Third Circuit follow its tentative thinking as indicated herein and order the enforcement of the status quo clause in the *Printing Pressmen's Union No. 9* proceedings, that result would directly conflict with the result reached below by the Sixth Circuit.

forcement reflects an exercise of judicial power or prerogative that the Sixth Circuit has here said was beyond the scope of a federal court's jurisdiction under § 301(a) of the Labor-Management Relations Act. Additionally, the rationale now supplied by the Third Circuit in justification of its twice-exercised enforcement of a status quo clause pending an appeal reveals a concept of the irreparable injury necessary to enforcement that is totally different from and in conflict with the concept expressed by the Sixth Circuit.

Giving due weight to the fact that the Third Circuit has been dealing so far only with temporary enforcement of the status quo clause pending an appeal, the extent of the differences between the two Circuits may be expressed as follows:

Third Circuit	*Sixth Circuit*
1. "Once it is found that the issues [on the merits of the dispute] are arbitrable, then it is arguable that the matter is properly a grievance subject to the status quo section. In the present posture of this appeal, we do not resolve this issue. We hold simply that at this time we cannot rule, without more, that Section 18 [of the agreement on which the company relied in justification of its work change] is absolutely controlling, precluding any possibility of applying the status quo section." See page 5a of Appendix hereto, *infra*.	1. "It was not the prerogative of the District Court to construe the 'status quo' clause of the contract or to make a factual determination as to whether there has been a violation of this clause. We see no reason why this issue, along with the basic underlying dispute between the parties, cannot be determined by arbitration." See page 5a of Appendix to Petition for Certiorari.

Third Circuit

2. "Accepting the premise that the issues [on the merits] are arbitrable, we cannot, at this stage, rule, as a matter of law, that violation of the status quo during arbitration is not in itself an irreparable harm to the plaintiff.

"The plaintiff is a union. The status quo section obviously represents a union victory at the collective bargaining table which created the 1972 agreement. The union contends that any rupture of this status constitutes irreparable harm. Self-descriptive by nomenclature, irreparable harm, as a ground for equitable relief, is what cannot be repaired, restored, put back again, atoned for, but may exist although the injury is compensable in damages and is not very great where there is actual and substantial injury of such character that the law cannot give adequate compensation or fair or reasonable redress. [Citing District Court oral opinion in the instant *Detroit* case.]

"Accordingly, we hold that whether the district court erred in its finding of irreparable harm is an

Sixth Circuit

2. "The Union contends that the irreparable injury to it is not the loss of jobs or wages, but the loss of its bargain with the employer on the 'status quo' provision. The Union argues that the 'status quo' clause does for it what the no-strike clause does for the newspaper, and that the violation of the 'status quo' clause has resulted in destroying this equality of position which is the essence of the collective bargaining agreement. The Union asserts that the resulting damage is not financial but is the consequent appearance to its members that the Union is helpless to discharge its obligations, which is its essential duty and function, and that this loss of confidence of the members would be irreparable. The District Court made no finding that this constitutes irreparable harm, and we do not consider that it could be so construed as irreparable harm on the basis of the record in this case." See page 8a of Appendix to Petition for Certiorari.

Third Circuit

arguable question; one which will be resolved at the decision on the merits of this appeal. Pending disposition thereof, we are constrained to grant an injunction pending appeal. . . . It is the thrust of appellant's argument that the loss of the status quo is irreparable. Although we do not decide that issue, we will preserve that status. To hold otherwise would dissipate completely the very status which is central to this litigation and also deprive appellant of the opportunity of litigating the issue." See pages 6a-7a of Appendix hereto, *infra*.

Sixth Circuit

Thus the Third Circuit has given express recognition to the possibility that a violation of the status quo clause may in itself constitute sufficient irreparable harm to the union's status and to the collective bargaining process to justify the enforcement of the status quo clause. To that extent, the memorandum ruling is at odds with the Sixth Circuit's blanket refusal to acknowledge that the violation of the clause is or can be a *per se* irreparable injury. See Petition for Certiorari, pages 19-21.

Only a few words need be added here in response to the respondents' Brief in Opposition, which serves to highlight and compound the confusion permeating the Sixth Circuit's opinion:

(1) Respondents seemingly concede (Br. Opp. 4) that the first and central holding of the Sixth Circuit is that a federal court lacks any "prerogative" to construe the status quo clause or to make a factual determination as to a violation thereof. The court said that such matters must be left to the arbitrator, acting at the termination of the pre-arbitration period. But respondents fail to explain how the arbitrator could ever make the status quo clause effective during the pre-arbitration period. An arbitrator's award of damages or back pay is not the equivalent of the suspension of unilateral work changes ordered by the employer during the pre-arbitration period, which suspension is the sole object of the status quo clause. Unless such a suspension is made effective during the pre-arbitration period, the clause is rendered totally impotent.[3]

(2) Respondents, in defending the second alternative holding of the Sixth Circuit (Br. Opp. 6-9), fail to explain how federal courts suddenly acquire the "prerogative" to construe the status quo clause and to determine a violation thereof when confronted with proof of irreparable injury by the union or its affected members. And they fail to explain the Sixth Circuit's insistence that even where the federal courts can enjoin violations of the status quo clause the arbitrator still retains final authority to determine the applicability of the clause in the first instance. See page 9a

[3] Respondents assert (Br. Opp. 7) that if the arbitrator's award cannot fully remedy a violation of the clause "irreparable injury" might be occurring so as to permit injunctive relief pending arbitration. But this is a meaningless argument in light of the Sixth Circuit's notion that "irreparable injury" must take the form of discharge, which could be remedied by the arbitrator. What other form of "irreparable injury" would satisfy the Sixth Circuit's idea of when a court injunction can issue?

of Appendix to Petition for Certiorari, and page 18 of Petition.

(3) Respondents, in reiterating (Br. Opp. 6-7) the Sixth Circuit's requirement that proof of "irreparable injury" precede judicial enforcement of the status quo clause pending arbitration, fail to recognize that the status quo clause is meant to be effective and enforced irrespective of whether a change in working conditions is accompanied by "irreparable injury" in the form of discharge or lay-off. That is precisely why the Sixth Circuit's insistence on a discharge as the price of judicial enforcement is contrary to the purpose and thrust of the status quo clause and the arbitration process of which it is a part. And that is why the District Court below and the Third Circuit in the attached *Newspaper Delivery Drivers* case are more faithful to the concept of the status quo clause in recognizing that an alteration of the status quo by any means justifies enforcement of this vital part of the arbitration *quid pro quo*.

(4) Respondents' final assertion (Br. Opp. 8-9) that a federal court dare not ignore the procedural mandates of § 7 of the Norris-LaGuardia Act emphasizes anew the need for reminding the lower federal courts and the labor bar that the arbitration process and the enforcement thereof are "not a part and parcel of the abuses against which the [Norris-LaGuardia] Act was aimed." *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 458 (1957).[4]

---

[4] Respondents, in support of their broad assertion that § 7 indiscriminately applies, cite *United States Steel Corp.* v. *United Mine Workers*, 456 F.2d 483, 487-8 (C.A. 3, 1972), which merely held that in a § 301 suit reasonable attorney fees could be recovered pursuant to § 7. The Third Circuit recognized that many other provisions of § 7 are inapplicable.

CONCLUSION

These various considerations augment the reasons why certiorari should be granted to review the judgment and opinion of the Sixth Circuit in this case.

Respectfully submitted,

GERHARD P. VAN ARKEL
EUGENE GRESSMAN
1828 L Street, N.W.
Washington, D. C. 20036

SHELDON L. KLIMIST
2460 First National Building
Detroit, Michigan 48226

Counsel for Petitioner

April 18, 1973

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-2141

NEWSPAPER, NEWSPRINT, MAGAZINE, AND FILM DELIVERY DRIVERS, LOCAL UNION NO. 211, *Appellant*,

v.

PITTSBURGH PRESS COMPANY.

Appeal from the United States District Court for the Western District of Pennsylvania.

MEMORANDUM OPINION SUR MOTION FOR INJUNCTION PENDING APPEAL

Present: SEITZ, *Chief Judge*, and ALDISERT and ROSENN, *Circuit Judges*.

Before the court is a motion for injunction pending appeal filed in accordance with F.R.A.P. 8, originally presented before the resident Circuit Judge in the Western District of Pennsylvania who heard oral argument thereon on December 16, 1972, and by him referred to a panel of this court for disposition.

We hold that the December 14, 1972, order of the district court denying the request for preliminary relief is an appealable order although styled by the court as a denial of "a temporary restraining order." Appellant's complaint

was filed December 8, 1972, requesting preliminary and permanent injunctive relief from work changes proposed by the company outlined in a letter dated December 1, 1972. On December 8, 1972, the court issued an order fixing a hearing on a preliminary injunction for December 11, 1972. The defendant was given proper notice thereof. The case was then assigned to another judge who set a hearing for December 13, 1972.

At the beginning of this hearing, the court stated, "Well now, I will give you a hearing on a temporary restraining order. You have asked for a hearing on a preliminary injunction, but I think you know that the other side is entitled to twenty days to file an answer to your complaint for a permanent injunction and if you want a hearing on the preliminary injunction, I will set it for some time in January, the week of January 8."[1]

On a request for a preliminary injunction the relevancy of pleadings necessary for a permanent injunction is at best evanescent; in this case, it is non-existent. Thus, pleading rules formed no bar to a hearing on appellant's request. The court further reasoned that the earliest that plaintiff could be heard on its request for a preliminary injunction was the week of January 8, 1973. Thus, faced with a dispute over a collective bargaining agreement expiring on December 31, 1972, the court ruled that the union could not have a hearing on a preliminary injunc-

---

[1] It is possible that the district court was misled by the position taken by defense counsel:

> We want to reserve the right to file an answer. If this matter is to be treated as a motion for preliminary injunction, we would certainly want the transcript of the court so that we may prepare a proposed findings of fact and conclusions of law. I would ask for the opportunity to prepare that as well as an extensive brief and memorandum of the law on these issues.

[Record, at 78.]

tion until eight days after the contract expired. We find it difficult to accept that the District Court for the Western District of Pennsylvania, consisting of twelve active and senior districts judges could not entertain a petition for a preliminary injunction filed December 8, 1972, until thirty days thereafter.[2] Moreover; we observe that the life of a temporary restraining order is ten days. Unless there was consent by the parties, additional court action was mandated prior to January 8, 1973.

Because there was no effort by the plaintiff to request relief without notice, and it appearing that the defendant was given timely notice of the hearing and participated actively therein in cross-examination, in the presentation of evidence and in oral argument, we are unwilling to construe the proceedings as a hearing on a temporary restraining order. The relief requested was for a preliminary injunction and the denial of that relief, irrespective of the label attached thereto by the district court, was a denial of a request for a preliminary injunction which constitutes an appealable order. 28 U.S.C. § 1292(a)(1).

The facts are not in dispute. Following changes, authorized by arbitration awards which affected other labor unions of the Pittsburgh Press, the company sent a letter to the union on December 1, 1972, suggesting job changes. The company contends:

> Attendant to this elimination of the [printing] press are certain other changes resulting therefrom directly at issue here, i.e., the elimination of two jobs on the loading dock which work directly off that press. In addition, circulation adjustments require the elimination of one of the three weekend trips to Fairmont, West Virginia, and the elimination of helpers on certain weekend delivery trucks.

---

[2] Although that court operates under the individual calendar system, we have previously observed that the hearing judge was not the original judge to which the case was assigned.

> These changes are necessitated because of the disastrous effects the two-week strike of the Pressmen's Union and the eighteen-week strike of the Printer's Union have had on the circulation and advertising of the newspapers. [Description of circulation and advertising losses omitted.] Total payroll costs for the employees represented by appellant union have risen in excess of 125%. Similar increases in employee-count and payroll costs have been gained by employees represented by other unions at appellee's paper.
>
> It is obvious from the above that the simple changes planned by appellee in the instant case are not only necessary but are vital to the future of viable newspapers in the City of Pittsburgh.

[Appellee's brief, pages 4-5.]

This litigation therefore, concerns "the elimination of two jobs on the loading dock" and "elimination of one of three weekend trips to Fairmont, West Virginia, and the elimination of helpers on certain weekend delivery trucks." It would appear that resolution of this dispute in the district court at the final hearing will require an accommodation of two sections of the collective bargaining agreement between the parties that expires December 31, 1972.

Appellant relies on Section 14:

> During the processing of a grievance, business shall be continued without interruption in a normal and orderly manner and the matter or matters in dispute, except cases of discipline resulting from a serious offense, shall revert to the status quo prevailing immediately prior to the time the grievance arose until a final decision of the matter or matters at issue shall have been reached.

Appellee relies on Section 18:

> The Company shall be the judge of the number of men to be employed and shall have the right to lay

> off. (This right is not superseded or abridged by any other Section or provision of this Contract or by any provision of this paragraph.)

Appellant contends that although the company "shall be the judge of the number of men to be employed and shall have the right to lay off," this can only be done after arbitration if the proposed action is considered a grievance by the union; that if the union considers it to be a grievance and gives notice, then it must be processed to arbitration during which the status quo shall be maintained under Section 14.

Appellee contends that the language of Section 18 controls absolutely, arguing that it has the right to lay off, and that this right is "not superseded or abridged by any other Section or provision" of the contract. Whatever appeal this argument may have had prior to the hearing, the district court has held otherwise, apparently upon a concession made by the appellee:

> At the hearing, the plaintiffs presented testimony that the defendant intended to change or alter its delivery routes because of decreased circulation. The defendant presented testimony that no one would be laid off, but there is a possibility of a decrease in overtime work and a change in job assignments. *The parties agree that the questions heretofore mentioned are arbitrable.*

We view as significant this finding by the court. Once it is found that the issues are arbitrable, then it is arguable that the matter is properly a grievance subject to the status quo section. In the present posture of this appeal, we do not resolve this issue. We hold simply that at this time we cannot rule, without more, that Section 18 is absolutely controlling, precluding any possibility of applying the status quo section.

It is necessary, however, that we relate this finding to other findings of the court: "The court therefore, upon the evidence presented to date, finds that neither the plaintiff nor any of its members will suffer irreparable harm and the defendant will suffer more from the granting of a temporary restraining order." Accepting the premise that the issues are arbitrable, we cannot, at this stage, rule, as a matter of law, that violation of the status quo during arbitration is not in itself an irreparable harm to the plaintiff.

The plaintiff is a union. The status quo section obviously reflects a union victory at the collective bargaining table which created the 1972 agreement. The union contends that any rupture of this status constitutes irreparable harm. Self-descriptive by nomenclature, irreparable harm, as a ground for equitable relief, is that what cannot be repaired, restored, put back again, atoned for, but may exist although the injury is compensable in damages and is not very great where there is actual and substantial injury of such character that the law cannot give adequate compensation or fair or reasonable redress.[3] *De Luxe Motor Cab Co.* v. *Dever*, 252 Ill. App. 156.

Accordingly, we hold that whether the district court erred in its finding of irreparable harm is an arguable question; one which will be resolved at the decision on the merits of this appeal. Pending disposition thereof, we are constrained to grant an injunction pending appeal.

We are influenced by the reality that the contract expires in less than two weeks. It is the thrust of appellant's argu-

---

[3] *Typographical Union* v. *Publishers Ass'n.*, (E.D. Mich.), 81 LRRM 2797, 2798 (Nov. 14, 1972), states:

> The Court also believes that for the status quo provision to have any meaning at all, it must be read apart from the provision requiring that all disputes arising out of the operation of the agreement be referred to the joint standing committee. To read it otherwise would render the provision a nullity, particularly when the arbitration process drags on, as it often does, for months.

ment that the loss of the status quo is irreparable. Although we do not decide that issue as we will preserve that status. To hold otherwise would dissipate completely the very status which is central to this litigation and also effectively deprive appellant of the opportunity of litigating the issue.

Notwithstanding the foregoing, the company offers the sound argument that should it prevail ultimately at arbitration it will have incurred substantial out-of-pocket costs pending arbitration. "It is estimated by the appellee that the issuance of an injunction will result in $1300.00 per week of unnecessary costs." [Appellee's brief, page 14.] We believe that the company should not be exposed to substantial losses if improvidently prevented from instituting the work changes at the desired time schedule.

We will therefore require appellant to file a special surety bond in double amount of the possible losses to which the company may be exposed by December 31, 1972, directly relating to work schedules of those members of plaintiff union described in its letter of December 1, 1972. Using the estimates furnished by appellee in its brief, page 14, we calculate this loss to be a total of $2600.00 for a two-week period. Appellant will be required to post this bond with the Clerk of the district court. Should the company prevail at arbitration on the issues which constitute the subject matter of this specific litigation, it shall have direct recourse to this surety bond for those losses actually sustained by it between December 17, 1972, and December 31, 1972, resulting from its being prevented from implementing the work changes of members of plaintiff union described in its letter of December 1, 1972, to the union.

Concurring and dissenting opinion by Judge Rosenn:

I agree with the majority that the filing of an answer is unessential to a hearing on an application for a preliminary injunction. Under the circumstances described in the

majority opinion, consideration of the hearing in the district court as an application for a preliminary injunction is not inappropriate. I agree therefore that the order before us is appealable. I dissent only because the limited issue before us on this motion for injunctive relief pending appeal is whether there was a clear abuse of discretion by the district court. Since the evidence adduced is unrefuted that no employees constituting members of the appellant union will be laid off and the change in operations of the employer involves only a reshifting of personnel to other jobs, I am unable on motion only to hold that the district court abused its discretion that upon the evidence presented to date "that neither the plaintiff nor any of its members will suffer irreparable harm and the defendant will suffer more from the granting of a temporary restraining order".

Order

For the reasons set forth in the foregoing memorandum opinion, it is ORDERED that pending disposition of this appeal the Pittsburgh Press Company, its officers, agents, and representatives be and are hereby restrained from implementing the work changes described in its letter of December 1, 1972, to Newspaper, Newsprint, Magazine, and Film Delivery Drivers, Local Union No. 211. This Order shall be conditioned upon appellant's deposit in the amount of $5200.00 with the Clerk of the United States District Court for the Western District of Pennsylvania subject to the conditions set forth in the foregoing memorandum opinion.

BY THE COURT,

/s/ ALDISERT, J.
Circuit Judge

Dated: December 26, 1972